No. 10757.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WM. L. GLADSTONE and H. H. HARRISON, Trustees for Psychic Spiritual Science Church, a trust estate,

Appellants,

vs.

MARY GALTON and RAY L. CHESEBRO, City Attorney for the City of Los Angeles, State of California,

Appellees.

BRIEF OF APPELLEES.

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TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

STATUTES.

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Statement of the Case.

The instant case was initiated by the filing of a Bill of Complaint "For protection against destruction of copyright persecution and unconstitutional law, and for damages on account of irreparable injuries, losses and damages caused, and application for temporary restraining order; temporary injunction and permanent injunction." [Tr. pp. 2 to 13] to which was attached Exhibits "A" and "B". [Tr. pp. 16 to 22.]

Thereafter, on January 25th, after service upon complainants, motion to dismiss was filed. [Tr. pp. 24-25.] On the same date the answer of the defendants [Tr. pp.

34 to 41] was filed. Also on that date the affidavit of Mary Galton, one of the defendants [Tr. pp. 26 to 33] was filed.

Complainants thereafter filed objection to our motion to dismiss [Tr. p. 42] and a motion to strike the affidavit of Mary Galton. [Tr. p. 43.]

On January 28, 1944, defendants' motion to dismiss was ordered submitted upon filing of briefs, and hearing on Order to Show Cause (why temporary injunction should not be issued) was continued to February 28, 1944. On February 25, 1944, the motion to dismiss was granted. [Tr. pp. 45-46.] Motion to dismiss was made upon two grounds:

1. Failure to plead jurisdictional facts.

2. Failure of the complainants to state facts sufficient to constitute a cause of action.

The status of the case is somewhat similar to an appeal from a judgment entered after a demurrer has been sustained without leave to amend. The only questions before this court concern the insufficiency of the complaint, and if the judgment of the lower court be overruled, it still remains necessary to try the issues of fact raised by the answer.

For that reason we shall not discuss in detail the factual questions involved. Suffice it to state that the evidence of the defendants will practically be the same as is the affidavit of defendants Galton above referred to [Tr. pp. 26 to 33.] Manifestly, if either of the grounds named in our notice of motion be good, the judgment of the lower court should be sustained.

POINT I.

The Complaint Does Not State Jurisdictional Facts.

Though complainants allege that they have suffered damage from a variety of causes, including arrest upon an unconstitutional ordinance, the only grounds assigned as giving the federal court jurisdiction is found in paragraph 3 of the complaint [Tr. p. 3] to be an alleged infringement of copyright causing damage in a sum in excess of $3,000.00.

The particulars as to how this nefarious deed was accomplished appear rather deftly concealed, but examination of paragraph 14 of the complaint [Tr. pp. 12-13] discloses that the alleged infringement consists of the carrying away, without the consent of the complainants, of some copies of a copyrighted book. Complainants fail to state how many of the said books were taken, or the value thereof. Irrespective of the possible value of the copyrighted books or works taken, it appears certain that the only act which Galton is charged with doing is the carrying away of certain physical articles, the contents of which were protected by copyright.

The copyright law (U. S. C. A., Title 17) protects the right of an author to print, publish and vend the products of his mind. (U. S. C. A., Title 17, Sec. 1; *Dymow v. Bolton,* 11 Fed. (2d) 690), and the copyright is distinct from the property in the material object copyrighted. (U. S. C. A., Title 17, Sec. 41.) Copyright is an intangible thing and is separate and distinct from the material object copyrighted.

Harms v. Cohen (D. C. Pa.), 279 Fed. 276.

Though one might forcibly take all the printed copies of a book, the contents of which are copyrighted, such action would not constitute an infringement of the copyright.

Depending upon circumstances surrounding the taking, such action might constitute grounds for a civil suit for recovery of the articles taken, for damages caused by such unlawful taking, or even a criminal prosecution of some sort. All of such actions would be within the jurisdiction of the State courts. Under some circumstances, unnecessary to discuss here, the U. S. District Court might have coordinate jurisdiction of such suits.

Suffice it to say here that the taking of physical property does not constitute an infringement of copyright.

Appellants' claim that the federal courts have exclusive jurisdiction in cases involving the infringement of copyright is undisputed but inapplicable to the instant case.

Examination of their brief discloses that the only claim made by them is that "* * * she (Galton) took unlawfully at the time she made the said arrests, copyrighted works of complainants *for the purpose of destruction of same,* by using the same for the sole purpose of evidence * * *." (Emphasis ours.) (Appellants' Brief p. 7.)

Section 2 of U. S. C. A., Tile 17, protects the right of an author of an unpublished work to recover damages for publication of an unpublished work without his consent. The works here involved were published and Section 2 has no application to this case. Examination of such Section 2 discloses that such right is not one conferred by the copyright law, but is a statement that such law does not abrogate a right which existed under the common law for

years before Congress enacted our Copyright Act. The situation in this case is no different, as a matter of law, from the situation which would arise were some one to break into the home of complainants and steal a copy of a book upon the contents of which the complainants had a copyright.

We find it unnecessary to discuss in detail the arguments of the appellants in their brief in respect to the rights of the holder of a copyright to protection. Admitting, for the purpose of argument only, that every statement of law contained therein other than that the forcible taking of personal property constitutes infringement of copyright, it does not follow that the complainant states jurisdictional facts. Because in their jurisdictional statement they rely upon the existence of a fact which other portions of the complaint plainly discloses does not exist, the question arises as to the effect of failure to properly plead jurisdictional facts. Federal Rules of Civil Procedure, Rule 8, Par. (a), Subdivision (1) provides that there shall be in each complaint a short statement of the jurisdictional grounds. In *Gates v. Graham Ice Cream Co.,* 31 Fed. Supp. 854, it was held that failure to set forth in such required statement sufficient facts to show jurisdiction in the Federal Government is grounds for dismissal of an action. Though it has been held (*Western Mutual Fire Insurance Co. v. Lamson Bros.,* 42 Fed. Supp. 1007) that a complainant may amend such statement, it appears to us that when, as in the instant case, it affirmatively appears that the complainants could add no facts to the statement of jurisdictional fact to show that there had been or now is an infringement of copyright, there is no abuse of discretion in dismissing the action. The allegation that

complainants suffered damage in a sum in excess of $3,000.00 adds nothing to the jurisdictional statement. Jurisdiction in copyright infringement cases does not depend upon the extent of the damage suffered.

Though we feel that this appeal can be, and will be, decided upon the point heretofore discussed, we shall discuss some questions which would be involved in the case had there been a sufficient showing of jurisdictional fact. In doing so we shall, so far as possible, limit our discussion to matters raised by appellants in their brief.

Incidentally, we note that it is alleged the headquarters of the trust estate is in Reno, Nevada, at which point they maintain a resident agent. [Tr. par. 1, p. 3.] Whether or not this is an attempt to plead diversity of citizenship we are unable to state. If such be the intent it falls short of accomplishing that purpose. The trust estate named in the complaint appears to be a partnership or joint enterprise, as is shown by Exhibit "A." [Tr. p. 16.] The domicile of the partnership is the domicile of those who compose it (*People of Puerto Rico v. Russell & Co.*, 228 U. S. 476, 77 L. Ed. 903), and the citizenship of the trustee, and not of those beneficially interested, governs. (*Knapp v. Troy & B. R. R. Co.*, 87 U. S. (20 Wall.) 117, 22 L. Ed. 328.) It affirmatively appears that at least one of the trustees (Gladstone) and the principal, if not all, of the activities of the trust estate are carried on in Los Angeles, California. [Tr. p. 4, par. 4.]

The remainder of the questions involved concern the alleged unconstitutionality of the ordinance involved, and we shall discuss the entire subject in a separate point.

POINT II.

Sections 43.30 and 43.31 of the Los Angeles Municipal Code Are Constitutional.

SUB-POINT A.

THE SECTIONS DO NOT INFRINGE UPON THE RIGHT OF CONTRACT.

The right to contract is subject to such reasonable restraints as the state, in the exercise of the police power, may impose.

> *Advance-Rumely Thresher Co. v. Jackson,* 287 U. S. 283, 77 L. Ed. 306.

It is well settled that all contractual obligations are subject to the police power of the state.

> *Edgar A. Levy Leasing Co. v. Siegel,* 258 U. S. 242, 66 L. Ed. 595;
>
> *Home B. & L. Assn. v. Blaisdell,* 290 U. S. 398, 78 L. Ed. 413.

It is equally well settled that the enforcement of a valid penal ordinance does not unlawfully interfere with one's right of contract, as the Fourteenth Amendment of the Federal Constitution does not guarantee to a citizen the right to contract within his State in violation of its laws.

> *Hooper v. State of Calif.,* 155 U. S. 648, 39 L. Ed. 297.

Complainants' statement that at the time of the making of the contract referred to there was no ordinance prohibiting fortune telling is incorrect. Ordinance No. 71928 of the City of Los Angeles, approved October 3, 1932, prohibited fortune telling in such city, and the pro-

visions of such ordinance became Sections 43.30 and 43.31 of the Los Angeles Municipal Code at the time the Penal Ordinances of the City were codified in 1936. Such fact is relatively unimportant, however, inasmuch as all contracts are entered into subject to the right of the state to properly exercise the police power. Though the State as a general proposition may not enact laws which impair the obligation of contracts, legislation enacted in the proper exercise of the police power are valid even though the incidental and collateral effect of such laws be to impair contractual obligations.

It would be a sad state of affairs indeed if contracts executed prior to the enactment of a police power measure remained effective but those subsequently made were illegal. It would certainly constitute a convenient method for a municipality to confer upon some persons exclusive right to commit acts jeopardizing the welfare of the community.

Liberty (Freedom of Contract) safeguarded, is liberty in a social organization which requires the protection of law against the evils which menace health, safety and general welfare, and is subject to regulation reasonable in relation to its subject and adapted to the interests of the community. (*West Coast Hotel Co. v. Parrish,* 300 U. S. 379, 81 L. Ed. 703.) The Fourteenth Amendment protects the right of a citizen to engage in any lawful business, but it does not prevent a municipality from prohibiting any business which is inherently vicious and harmful. (*Murphy v. Peo. of the State of Calif.,* 225 U. S. 623, 56 L. Ed. 1229.) That the occupation of fortune telling has been considered harmful and persons following such occupation have been classed as vagrants since long before

the foundation of the Republic is a matter of legislative history. (*Davis v. State,* 118 Ohio St. 25, 160 N. E. 473, error to U. S. Supreme Court dismissed 277 U. S. 571; see, also, annotation 43 L. R. A. (N. S.) 203.)

Sub-point B.

The Ordinance Is Not Invalid Because of Discrimination.

Complainants urge that the ordinance is void because it grants exclusive rights to certain parties and denies such privileges to complainants.

There are, however, no facts alleged which show that such a condition exists. It does not appear by the petition that any person has qualified as coming within the exception, and by reason thereof is permitted to tell fortunes in the city. A litigant can be heard to question a statute's validity only and insofar as it is being applied to his disadvantage.

> *Utah Power & Light Co. v. Pfost,* 286 U. S. 165, 186, 76 L. Ed. 1038, 1049.

Claims based merely upon assumed potential invasion of rights are not enough to warrant judicial intervention.

> *Ashwander v. T.V.A.,* 297 U. S. 288, 324, 80 L. Ed. 688, 699.

Examination of Sections 43.30 and 43.31 discloses that no discrimination can exist. Section 43.30 prohibits anyone from engaging *in the business* of fortune telling. Section 43.31 does not purport to permit persons to *engage in the business* of fortune telling, but it does provide that the provisions of Section 43.30 *shall not be deemed to pre-*

vent worship services of those who conduct such services of a church organization having as one of its tenets or articles of faith a belief in an ability to foretell the future, or to prophecy. When and if the ministers of such a church step aside from their pastoral duties and engage in the business of fortune telling, they render themselves subject to the prohibitory provisions of Section 43.30.

Another reason why the complainants and appellants may not urge discrimination is disclosed by comparing their complaint with the provisions of the ordinance. The complainants are suing for and on behalf of the trust estate, a copartnership. The exemption created by Section 43.31 is for the benefit of individuals who belong to a certain class, and not for the benefit of the church to which they may belong. If we assume, for the purpose of argument only, that the reasons given above are insufficient to overcome complainants' objections to the ordinance on account of alleged discrimination, yet another reason appears why the exception created by Section 43.31 is valid.

The legislative authority, acting within its proper field, is not bound to extend its regulations to all cases which it might reach. It is free to confine its restrictions to those classes of cases where the need is greatest. A law which hits the evil where it is most felt will not be overthrown because there are other instances to which it might have been applied.

> *West Coast Hotel Co. v. Parris, supra,* 300 U. S. 379, 81 L. Ed. 703.

Classification may be accomplished in two ways: (1) by so drawing a prohibitive act as to include within its provisions only those in a certain class, or, (2) by making

the prohibition effective against all persons, and then by a separate provision excluding those belonging to a certain class.

In the ordinance under consideration the latter method has been used. The ordinance does not confer upon anyone the right to do an act which they could not perform were it not for the authority granted. All persons would have the right to tell fortunes were it not for the prohibition contained in the law. The legislative authority may have found as a fact that the evil occasioned by permitting the ministers of churches having certain religious beliefs to continue in their religious activities would not equal the evil which would result by reason of suppression of a religious practice and for that reason it, by means of Section 43.31, established a class not within the prohibition of Section 43.30, unless members of the class *engaged in the business of* fortune telling.

Regulatory statutes are presumed to be supported by facts known to the legislature unless facts judicially known or proven preclude the possibility of the existence of such facts (*Sou. Carolina Highway Dept. v. Barnwell Brs.,* 303 U. S. 177, 82 L. Ed. 734), and when the classification made by the legislature is called in question, if any statement of facts reasonably can be conceived that would support it, there is a presumption of the existence of such facts and one who assails the classification must carry the burden of showing that the action is arbitrary. (*Borden v. Baldwin,* 293 U. S. 194, 209, 79 L. Ed. 281, 288.) The complainants have completely failed to plead the existence of any fact which would exclude the possibility of classification created by this ordinance being reasonable.

against the organization of which Gladstone was a trustee. If the appellant Gladstone was guilty of the crime charged (and his plea of guilt admitted it) it is wholly immaterial whether his apprehension and arrest was occasioned by ill will of some person towards him.

Conclusion.

Appellees submit that the ordinance constitutes a proper exercise of the police power and that the complaint wholly fails to state facts, which if true, would constitute the enforcement of an invalid ordinance. If the complainants have suffered any damage whatsoever it is because of the insistence of the members of the organization in violating a penal statute. Courts are not created for the purpose of protecting persons against the results of their own unlawful acts.

The judgment of the lower court is correct and should be sustained.

Respectfully submitted,

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